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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 180

HARRY JOSEPH PAYNE,

Petitioner,

vs.

PAUL J. MADIGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

FREDERICK M. ROWE
HOWARD P. WILLENS
800 World Center Building
Washington 6, D. C.

Attorneys for Petitioner

December 30, 1960

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

Contrary to this Court's basic directive that criminal sentences must be imposed with "meticulously precise language," the Court of Appeals permitted an ambiguous sentence pronounced in open court to be cured by clerical documents prepared in the defendant's absence after the conclusion of the judicial proceeding. This lax procedure improperly dilutes and delegates the judge's solemn duty to impose sentence in the presence of the defendant, and invites reaffirmation by this Court of the federal judiciary's responsibility to conduct criminal proceedings with dignity and clarity in order to preserve public confidence in the administration of justice.

Opinions Below

The opinion of the Court of Appeals (R. 15-19) is reported at 274 F.2d 702 (9th Cir. 1960). The opinion of the District Court for the Northern District of California (R. 10-11) is not officially reported.

Jurisdiction

The Judgment of the Court of Appeals (R. 20) was entered on January 19, 1960. A motion for leave to proceed *in forma pauperis* and a petition for a writ of certiorari were filed on February 5, 1960, and both the motion and petition were granted on June 27, 1960 (R. 21). Counsel was appointed by order of this Court dated October 10, 1960. The jurisdiction of this Court is founded on 28 U.S.C. §1254(1).

Question Presented

In sanctioning a patently ambiguous sentence pronounced by the district judge, the Court of Appeals held that "written judgments and commitments may properly serve the function of resolving ambiguities in orally pronounced sentences" (R. 18). Since the defendant's right to be present during all stages of the criminal proceeding affecting his substantive rights is an essential safeguard of our criminal law, the basic question presented is whether written Judgment and Commitment forms prepared in the defendant's absence after the open judicial proceeding may amplify a defective or ambiguous sentence pronounced by the judge.

Statutes and Rules Involved

Rule 20, Federal Rules of Criminal Procedure:

> A defendant arrested in a district other than that in which the indictment or information is pending against him may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district.

Rule 32, Federal Rules of Criminal Procedure:

> (a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.
>
> (b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The

judgment shall be signed by the judge and entered by the clerk.

Rule 43, Federal Rules of Criminal Procedure:

> The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules.

Statement

On March 16, 1956, petitioner appeared before the District Court for the Eastern District of Tennessee, Southern Division, for arraignment on six informations and one indictment charging diverse violations of various sections of the postal laws in Tennessee, Illinois, Wisconsin and Missouri over several years (R. 5).[1] Six of these criminal proceedings were before the court for plea and sentence pursuant to Rule 20 of the Federal Rules of Criminal Procedure, whereby petitioner consented to have the cases transferred from the several judicial districts in which the charges were originally filed.

After receiving petitioner's pleas of guilty (R. 6), the district judge imposed sentence. Advising petitioner that "you are going to get much less than" the statutory "max-

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[1] The two counts in No. 10,676 arose in the Eastern District of Tennessee in January, 1956. The two counts in No. 10,677 arose in June, 1954 in the Northern District of Illinois. No. 10,678 arose in the Middle District of Tennessee in April, 1955. No. 10,679 in two counts arose in the Middle District of Tennessee in September, 1955. No. 10,680 arose in the Western District of Tennessee in January, 1956. No. 10,681 arose in the Eastern District of Wisconsin in June, 1954. The last separate case, No. 10,682, arose in the Western District of Missouri in March, 1955.

imum," the judge undertook "to arrive at what is right, *making the sentence in each of those cases two years.*[2] Also, if there is the count for taking the money orders and one for breaking and entering I have made them concurrent" (R. 6-7).

In further detail, the judge observed that the two counts in No. 10,676 were "probably two different things, anyway I am just putting one year in each count, concurrent" (R. 7). In No. 10,677 the court imposed "two years on the first count and one year on the other, making it concurrent or making two years for that charge" (R. 7). In No. 10,678, the judge imposed two years on the first count, and one year on the second count "concurrent" (R. 7). Misreading the information in No. 10,679 as involving "two different post offices, one at Hurricane Mills and the other one at Nunnally, the same thing,"[3] the court imposed "two years on the first count, and one year on the second count concurrent" (R. 7). After setting two years in No. 10,680, the court imposed one year on each of the two counts in No. 10,681 "concurrent" (R. 7). Finally, the court imposed two years in the seventh proceeding, No. 10,682, adding that "all the different *indictments* will be consecutive" (R. 7).

Recapitulating the sentences, the court observed "Now, let's see, that is thirteen years, is that correct?" (R. 7). After the prosecutor questioned this total, and arrived at twelve (R. 7), the clerk interposed that "Thirteen is right" (R. 8). The court then suggested fourteen years as the correct total, declaring "One as I say it was involving the same instance, I took off one" (R. 8).

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[2] Emphasis added throughout unless otherwise indicated.

[3] In fact both counts in No. 10,679 referred to offenses occurring at Hurricane Mills, Tennessee.

At this juncture, the judge summarized for the benefit of counsel:

> "Did you get it, Mr. Thrasher? 10,676, one year; 10,677 two years; 10,678 two years; 10,679, two years; 10,680 two years; 10,681 is two years; 10,682 is two years, consecutive as to all cases" (R. 8).

Since the judge's summary not only amounted to *thirteen* years but also departed from the one year sentence previously imposed in No. 10,681, the prosecutor inquired: "No. 10,681, how is that?" The judge replied:

> "It is two years.
>
> "I believe that is reasonable sentence in view of all the depredations. I do not believe in unusually long terms, but this is a pretty good term. I could easily hike that up to twenty years. That satisfies me. It is my best judgment and my conscience is satisfied. That will be the judgment of the Court" (R. 8).

More than two years after his confinement to the penitentiary, petitioner sought a writ of habeas corpus, challenging the sentencing court's pronouncement "as too indefinite, ambiguous and equivocal" and requesting his release from further imprisonment because he had satisfied the legal portion of his sentence (R. 3). The petition was denied by the district court, which found it "clear" from the record that "the court in its judgment directed that petitioner be confined consecutively on the several indictments for a total sentence of 12 years" (R. 10).

The Court of Appeals for the Ninth Circuit affirmed, though recognizing that the sentence imposed by the judge in petitioner's presence had failed to fix any commencement dates of the several sentences or to determine their sequence. The court postulated that "The order of serving

consecutive sentences is a matter of substance," and that the sentencing court must "indicate the sequence of sentences when consecutive sentences are imposed" (R. 18). Stressing the multiple indictments in this case, the court also cited "authority for the view that a more precise specification of the order of sentences must be indicated than is to be found in the instant oral sentences" (R. 18).

However, to ascertain the "more precise specification" lacking in the judge's pronouncement, the court ultimately resorted to the more detailed contents of the written Judgments and Commitments—which were furnished to the Court of Appeals by the U.S. Attorney *after* the submission of the cause.[4] In the court's opinion, these Judgments and Commitments actually "resolved an ambiguity," for "The manner in which the pronouncements were made indicates that a sequence of sentences corresponding to the numerical order of the cases was *probably intended.* The written judgments and commitments, signed by the judge on the same day, confirm this inference" (R. 18).

Above all, the court decided, "In our view written judgments and commitments may properly serve the function of resolving ambiguities in orally pronounced sentences" (R. 18).

By the same rationale, the Court of Appeals also held that the administrative documents could serve to clarify "the total time to be served, concerning which there was some confusion at the time of sentencing" and to correct other ambiguities resulting from the oral pronouncement of sentence (R. 19).

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[4] On December 29, 1960 the Clerk of the Ninth Circuit telegraphed petitioner's counsel upon request that these judgments, not part of the original record in this case, had nevertheless been considered by the court below, and were hence being certified as a "supplemental record."

Summary of Argument

Federal courts, which are traditionally vested with plenary discretion in the imposition of criminal sentences, must execute this solemn judicial function in accord with basic procedural safeguards designed to promote fairness to the accused and public confidence in the administration of justice. A fundamental requirement is that sentences pronounced by the judge at the culmination of the proceeding must be stated with clarity in open court in the presence of the defendant. Particularly where several diverse criminal indictments are consolidated for bulk sentencing, the judge must at least specify with "meticulously precise language" how long the defendant must spend in prison, and when each of the several sentences is to begin. In the absence of such a specification, as held by Mr. Justice Bradley's landmark opinion in the *Patterson* case in 1887, multiple sentences on diverse indictments must be construed to run concurrently from the time of judgment.

To be sure, Mr. Justice McReynolds' opinion in the *Daugherty* case in 1926, while expressly preserving the *Patterson* principle for sentences on *multiple indictments*, sanctioned a lesser degree of specificity for sentences based on multiple counts of a *single indictment*. Although reversal of the decision below, which concerns multiple indictments, is thus compatible with *Daugherty*, *Daugherty's* reasoning may well be superseded, in any event, by the detailed specifications for multiple sentences now recommended by the Federal Rules of Criminal Procedure's official forms for judgments and commitments in *all* criminal cases.

Such greater specificity in *all* multiple sentences would not only protect the rights of defendants, but would doubt-

less improve the administration of justice—by promoting dignity and clarity in the sentencing process and abating the present flood of prisoners' challenges to obscure sentencing pronouncements.

The obscure pronouncement by the sentencing judge in this case failed to observe minimal standards of judicial clarity. The sentence is amenable to interpretations of a *total* sentence varying from two to fourteen years, and does not specify when any one of the different sentences in the seven proceedings is to begin in relation to any of the others. Indeed, as suggested by the Court of Appeals, the sentencing pronouncement was not "intelligible" without some "administrative effort" at clarification after the judicial proceeding.[5]

Written Judgments and Commitments prepared in the absence of the accused cannot amplify ambiguous or defective pronouncements by the sentencing judge. Such a resort to administrative forms, prepared *ex parte*, for defining essential elements of criminal sentences operates to nullify the defendant's traditional right to a judicial determination of his sentence in open court. Such a lax procedure, moreover, would mechanize and debase a crucial and solemn element in the federal courts' administration of justice, by relieving the judge of his personal obligation to pronounce criminal sentences with dignity and clarity.

[5] As detailed in note 18, *infra*, the United States Attorney on November 2, 1959 reported to the Director of the Bureau of Prisons that the Court of Appeals during the hearing on petitioner's case suggested that "there should be some administrative effort to correct his sentence to a [sic] intelligible one."

ARGUMENT

I.

A Judicial Pronouncement Imposing Criminal Sentences on Multiple Indictments Must Specify Clearly When Each of the Sentences Begins and Ends.

Federal courts historically exercise wide discretion to impose criminal sentences in the interest of justice. As the climax of any criminal proceeding, imposition of sentence should symbolize the court's solemn consideration of the circumstances of the offense and the character of the individual defendant, after affording the defendant "an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."[6] In sentencing, as recognized by this Court, "a judge usually moves within a large area of discretion and doubts," *Carter* v. *Illinois*, 329 U.S. 173, 178 (1946), within which he may "adapt the punishment to the degree of crime." *Ex parte De Bara*, 179 U.S. 316, 322 (1900). And so long as the sentencing judge observes the essential formalities and imposes a sentence within the statutory limits, appellate courts will not interfere.[7] Indeed, the imposition of sen-

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[6] F.R. Crim. Proc. 32(a). The exercise of a sound judicial discretion requires "consideration of all the circumstances of the crime" and "the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." *Williams* v. *Oklahoma*, 358 U.S. 576, 585 (1959). In addition, this Court has confirmed that the sentencing court may properly utilize a broad range of information bearing on the defendant's personal history to assist in the exercise of its discretion. *Williams* v. *New York*, 337 U.S. 241 (1949).

[7] *Blockburger* v. *United States*, 284 U.S. 299 (1932); *Granger* v. *United States*, 275 F.2d 127 (5th Cir. 1960); *United States* v. *Rosenberg*, 195 F.2d 583 (2d Cir. 1952), *cert. denied*, 344 U.S. 838 (1952).

[illegible], "probably the most weighty action taken by a judge," may be the only final judicial determination "that is not subject to appellate review or reconsideration."[8]

Protection of the rights of defendants and preservation of public confidence in the administration of justice demand that such plenary discretion be exercised with dignity and clarity by the judge. For a criminal defendant often lacks legal or semantic sophistication, and should at least learn from the sentencing pronouncement whether he must go to prison, and if so, for how long and when.

Thus, in *United States* v. *Daugherty*, 269 U.S. 360, 363 (1926), this Court stressed that criminal sentences "should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." This Court admonished "the trial courts to require the use of meticulously precise language in all judgment entries," and cautioned that "Especial care is essential where sentences for crime are imposed." *Id.* at 364.[9]

As recognized by the historic opinion of Mr. Justice Bradley in *United States* v. *Patterson*, 29 Fed. 775 (C.C.D. N.J. 1887), these requirements become of mounting concern whenever sentences are imposed in bulk on multiple indictments. The sentencing pronouncement in *Patterson*,

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[8] McGuire & Holtzoff, "The Problem of Sentence in the Criminal Law," 20 B.U.L.Rev. 423, 426 (1940).

[9] See also *Simunov* v. *United States*, 162 F.2d 314 (6th Cir. 1947), emphasizing "that the convict should know with certainty what his punishment is to be, and that a reviewing court should not be called upon to speculate as to what was in the mind of the sentencing judge at the time of the imposition of the penalty. It is imperative in maintaining respect for the judgments of courts that sentences in criminal cases should not be equivocal. This is more vital than the interests of a particular defendant in a criminal case." *Id.* at 315.

while stating that several sentences on multiple indictments "shall not run concurrently," nevertheless failed to state the commencement date of any sentence, or otherwise specify "the order in which they were to run." *Id.* at 777-78. Such a pronouncement was held "uncertain, and incapable of application," for "No intelligence is sufficient to answer the question" as to which sentence applied to which of the several indictments. *Id.* at 778. As Justice Bradley viewed it,

> "If, for any reason peculiar to either of said indictments, as, for example, some newly-discovered evidence, should be a different face put upon the case, so as to induce the executive to grant the prisoner a pardon of the sentence on that indictment, no person could affirm which of the three terms of imprisonment was condoned. If a formal record of any one of the indictments, and the judgment rendered thereon, were, for any reason, required to be made out and exemplified, no clerk or person skilled in the law could extend the proper judgment upon such record. He could not tell whether it was the sentence for the first, the second, or the last term of imprisonment." *Ibid.*[10]

In sum, Mr. Justice Bradley ruled in *Patterson* that "A prisoner is entitled to know under what sentence he is imprisoned," and that the "vague words in question" were

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[10] Similarly, the post-conviction remedies today afforded petitioner by 28 U.S.C. §2255 are "available only to attack a sentence under which a prisoner is in custody." *Heflin* v. *United States*, 358 U.S. 415, 418 (1959); *Williams* v. *United States*, 267 F.2d 559 (10th Cir. 1959), *cert. denied*, 361 U.S. 867 (1959). Any failure to specify with certainty the period of imprisonment under each of several sentences simultaneously imposed therefore clouds realization of the Congressional design to liberalize post-conviction remedies available to federal prisoners. Cf. *United States* v. *Hayman*, 342 U.S. 205, 210-19 (1952).

"insufficient to alter the legal rule that each sentence is to commence at once, unless otherwise specially ordered." *Ibid.*[11]

To be sure, a lesser degree of clarity may perhaps suffice where multiple counts of a *single indictment*, rather than multiple indictments, are involved. Mr. Justice McReynolds' opinion for the Court in *United States* v. *Daugherty*, 269 U.S. 360 (1926), appears to permit the imposition of multiple consecutive sentences to be served in the numerical sequence of the *counts of a single indictment* despite the lack of such an express specification, at least where this was the "reasonable and natural implication" of the judge's pronouncement. But *Daugherty* carefully distinguished and preserved the *Patterson* rationale, stressing that it "grew out of a sentence under pleas of guilty to three separate *indictments*," so that the question "was materially different from the one here presented which concerns counts in one indictment." *Id.* at 363.[12]

A distinction in the degree of specificity required to impose sentence on *multiple indictments*, as contrasted with multiple counts of a *single indictment*, may be supportable

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[11] Congress recognized the importance of avoiding "confusion, uncertainty, and diversity" in federal sentencing practices, and of providing "uniformity as to the time when sentences of federal prisoners shall commence to run," when in 1932 it revised 18 U.S.C. §3568, so that federal sentences "shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence" or from the time the prisoner is "committed to a jail or other place of detention to wait transportation to the place at which his sentence is to be served." See H.R. Rep. No. 960, 72d Cong., 1st Sess. 1-2 (1932).

[12] The *Daugherty* opinion described *Neely* v. *United States*, 2 F.2d 849 (4th Cir. 1924), as "more nearly in point." *Neely* sustained a general sentence upon *five counts of one indictment*.

by the practicalities behind the different methods of prosecution.[13] Under Rule 8 of the Federal Rules of Criminal Procedure, multiple counts in a single indictment typically denote various facets of a single criminal proceeding built on a single fundamental transgression. A judge's imposition of multiple sentences on such intertwined counts, even if lacking meticulous precision, may gain some illumination from the sequence or contents of the indictment's several counts. No comparable clarification, however, can result from multiple indictments consolidated for sentencing under Rule 20 of the Federal Rules of Criminal Procedure, where no discernible relation among the several indictments exists.[14] Indeed, the complexity of a bulk sentence for diverse and unrelated offenses may enhance the need for greater specificity in the judge's pronouncement, so that the defendant is properly apprised of the nature of his punishment with reference to *each* distinct offense.

But whatever its present validity on its own peculiar facts, the wider rationale of Mr. Justice McReynolds' *Daugherty* opinion of 1926 appears superseded by the more exacting standards codified two decades later by the Federal Rules of Criminal Procedure on the basis of experience in the interim. As reflected in official Form 25 for Judgment and Commitment appended to the Federal Rules of Criminal Procedure, even sentences based on multiple counts

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[13] However, some appellate cases have not recognized the distinction drawn by Mr. Justice McReynolds' *Daugherty* opinion, although not discussing the point or the *Patterson* precedent. *E.g. Barker* v. *Looney*, 261 F.2d 616 (10th Cir. 1958); *Ziebart* v. *Hunter*, 177 F.2d 847 (10th Cir. 1949).

[14] Although indictments or informations may be consolidated for trial under Rule 13 "if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information," no similar conditions apply to consolidate sentences under Rule 20.

of an indictment should specify expressly "whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence." Granting the advisory rather than mandatory character of Form 25, these modern provisions nevertheless reflect a considered and authoritative judgment that a higher degree of specificity is appropriate in the imposition of criminal sentences than *Daugherty* tolerated in 1926.[15]

Actually, the *Daugherty* rationale of 1926 may well warrant reassessment and restatement by this Court, thirty-five years later. Unlike the lower trial and appellate courts, this Court "is in a peculiarly strategic position to watch the ebb and flow of criminal litigation."[16] At the very least, the precision in sentencing reflected in Form 25, if made *mandatory* for judges, would surely promote dignity and clarity in the oral pronouncement of criminal sentences, and stem the rising flood of litigation involving legal challenges by prisoners to obscure and rambling pronouncements by judges.[17]

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[15] Compare *Gadsden* v. *United States*, 223 F.2d 627 (D.C. Cir. 1955), holding another aspect of Form 25 to be relevant in interpreting the requirements of Rule 32(a).

[16] Tom C. Clark, Attorney General of the United States, Foreward to New York University School of Law, Federal Rules of Criminal Procedure with Notes and Proceedings of Institute iii (1946).

[17] Particularly in recent years, the interpretation of obscure criminal sentences has been frequently before the lower courts. West Publishing Company's Federal Digest through 1959 devoted approximately 36 pages to decisions occasioned by ambiguous sentencing pronouncements. And one authoritative commentator has concluded that "One of the knottiest questions of criminal procedure is how to tell when sentences are concurrent and when they are consecutive." Orfield, Criminal Procedure From Arrest to Appeal 575 (1947).

II.

The Vague Judicial Pronouncement Sentencing Petitioner to Imprisonment Failed to Define the Length and Sequence of the Several Sentences.

Confused in several significant respects, the obscure pronouncement of the sentencing court fell far short of the minimal standards of clarity required for criminal sentences on diverse indictments.

Thus, in two of the seven separate proceedings the judge imposed conflicting terms of imprisonment for a single offense (see pp. 4-6 *supra;* R. 5-7). Although observing that "all the different *indictments* will be consecutive," the court neglected to specify *when* any one of the sentences in the seven cases were to be served in relation to each other (R. 7). In another of the proceedings, the court failed to impose *any* sentence on one count of the multi-count indictment (*Ibid.*). Utter confusion reigned in court among all present at the sentencing proceeding as to how long or when the judge directed the petitioner to go to prison on the several offenses charged (R. 7-8).

Certainly, the obscure pronouncement of the district judge mocks the "meticulously precise language" required in the solemn imposition of criminal sentences. The Court of Appeals actually commented on the "ambiguities" and lack of that "more precise specification" essential where multiple indictments are joined for simultaneous sentencing, and had to proceed by reference to what the judge "probably intended" (R. 18). Even the prosecutors recognized that this ambiguous judicial pronouncement entailed "administrative effort to correct [petitioner's] sentence to

a [sic] intelligible one," and felt "that twelve years is the longest defensible sentence under the facts herein." [18]

Significantly, the "administrative effort" necessary to render this pronouncement "intelligible" includes the recalculation of such essentials as the commencement date of each of the sentences imposed, and the total years of imprisonment to be served by petitioner.

Even if the judge's pronouncement of sentence were less steeped in confusion, it would flout minimal standards of clarity in a criminal context. For, "Serious uncertainty in criminal sentences must be resolved in favor of liberty," *Aderhold* v. *McCarthy*, 65 F.2d 452, 453 (5th Cir. 1933), and it is a "presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell* v. *United States*, 349 U.S. 81, 83 (1955). This Court's "policy of lenity" in interpreting federal criminal statutes *a fortiori* bars reliance on what a judge "probably intended" in sending petitioner to prison upon waiver of trial and consent to consolidated sentencing.[19]

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[18] Letter from Lynn J. Gillard, United States Attorney, to Director, Bureau of Prisons, November 2, 1959. Since subsequent portions of this correspondence were attached to the Brief for the Respondent in Opposition to the Granting of the Petition for a Writ of Certiorari, petitioner has incorporated the entire correspondence as an Appendix to this Brief.

[19] Cf. *Ladner* v. *United States*, 358 U.S. 169, 178 (1958), where this Court held that its "policy of lenity" precludes any interpretation of a criminal statute which increases "the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."

III.

Written Judgments and Commitments Prepared in the Absence of the Accused Cannot Cure Ambiguities and Defects in the Sentencing Pronouncement.

The written forms of Judgment and Commitment prepared *ex parte* after the conclusion of the open court session cannot amplify the judge's pronouncement of sentence. Such a doctrine would entail improper delegation of solemn judicial functions to administrative officials, and deprive a defendant of his historic right to be present and speak on his own behalf in mitigation of punishment.

As long recognized by this Court, "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." *Lewis* v. *United States*, 146 U.S. 370, 372 (1892).[20] Climaxing the entire criminal proceeding, the imposition of sentence is obviously a matter of fundamental concern to the defendant. Codifying an elemental safeguard of Anglo-Saxon jurisprudence, Rule 43 of the Federal Rules of Criminal Procedure expressly affirms the defendant's right to "be present at the arraignment, at every stage of the trial . . . and at the imposition of sentence," and Rule 32(a) assures him the "opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

Accordingly, a sentencing court cannot change its original pronouncement of sentence later in the defendant's absence. In *Hill* v. *United States*, 298 U.S. 460 (1936), this Court refused to permit instructions by the court to the

[20] See also *Shields* v. *United States*, 273 U.S. 583 (1927); *Hopt* v. *Utah*, 110 U.S. 574 (1884).

clerk to enlarge a commitment beyond the oral pronouncement in open court, stressing that the imposition of punishment "is part of the judicial function" and "must have expression in the sentence." *Id.* at 464. Declining to permit such *ex parte* instructions to "regulate the form or content of the sentence, which is to be recorded by the clerk without addition or amendment," Mr. Justice Cardozo's opinion cautioned that "Something more is needed than a few words of unrecorded talk between a judge and a prothonotary to compass that result." *Id.* at 466. For "The only sentence known to the law is the sentence or judgment entered upon the records of the court," and a "warrant of commitment departing in matter of substance from the judgment back of it is void." *Id.* at 464, 465. See also *Greene* v. *United States*, 358 U.S. 326, 329 (1959).

Indeed, the fundamental requirement that criminal sentences be imposed "with meticulously precise" language is designed to guarantee exact judgments which do not require subsequent amplification. This Court emphasized in *Daugherty* that criminal sentences should be stated with such certainty as to "exclude any serious misapprehensions by those who must execute them." 269 U.S. at 363. Implementing this Court's *Daugherty* directive to prevent cumulation of separate criminal sentences, the Seventh Circuit similarly held that a criminal sentence "should be so complete that to ascertain its meaning it will not be necessary to supplement the written words by either a nonjudicial or ministerial officer." *United States* v. *Denemark*, 138 F.2d 289, 290-91 (7th Cir. 1943).[21]

[21] In opposing a proposed federal indeterminate sentence bill, 52 federal court judges of the 62 replying to a questionnaire stressed that under the bill "all judicial control over the matter of punishment, in the case of serious crimes, is removed, and the matter is left to the unreviewable discretion of an administrative board, which will lack many of the features which have given the public confidence in the courts." Committee on Punishment for Crime, Report to the Judicial Conference 6-7 (1942).

In practical effect, the court below nullified these basic procedural safeguards. Nominally, the court recognized that the "order of serving consecutive sentences is a matter of substance," and acknowledged the "authority for the view that a more precise specification of the order of sentences must be indicated than is to be found in the instant oral sentences" (R. 18). Yet, notwithstanding its recognition that the criminal sentences contained in the judgment and commitment "must have been imposed in the presence of the defendant" (R. 17), the court embraced the novel and far-reaching doctrine that the "written judgments and commitments may properly serve the function of resolving ambiguities in orally pronounced sentences" (R. 18).

This doctrine defies the basic requirement that sentences be imposed in open court. By the theory of the Court of Appeals, written forms of Judgment and Commitment prepared *in absentia*, rather than the judicial pronouncement in the defendant's presence, are dispositive of the actual commencement dates of petitioner's multiple sentences and the extent of his total imprisonment. In effect the court below thus relieved the district judge of his responsibility to climax the criminal proceeding with an unequivocal pronouncement of sentence, and approved resort to *ex parte* documentation for reconstituting the judge's unintelligible directive.[22]

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[22] Indeed, a district court's "usual custom of having formal judgments entered subsequent to its disposition of the matters in open court" may be permissible only to the extent there is *no variance* between the written forms and the oral pronouncements which they record. *United States* v. *Meredith*, 172 F.2d 745, 746 (7th Cir. 1949).

Conclusion

Reversal of the sweeping decision below is essential to the fair and dignified administration of criminal justice in the federal courts. As recognized in this Court's landmark *McNabb* decision,

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force." *McNabb v. United States*, 318 U.S. 332, 340 (1943).

Such "civilized standards of procedure" require that criminal sentences be pronounced by district judges in open court with sufficient clarity that defendants of ordinary intelligence are at least informed, with respect to *each* separate criminal charge, whether they must go to prison, and if so, for how long and when.

Accordingly, the decision below should be reversed and remanded, with direction that the petitioner, having served

the lawful portion of his sentence, be discharged from imprisonment forthwith.[23]

Respectfully submitted,

FREDERICK M. ROWE
HOWARD P. WILLENS
800 World Center Building
Washington 6, D. C.
Attorneys for Petitioner

December 30, 1960

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[23] As construed in accord with Mr. Justice Bradley's *Patterson* opinion, the instant sentencing pronouncement authorizes no more than two years of imprisonment. Since petitioner has been imprisoned for more than *six* years with appropriate statutory deductions, he is entitled to release from any further illegal detention.

The sentencing court is obviously barred from sentencing petitioner anew so as to increase his sentence after its original imposition and start of service, in the light of the Fifth Amendment's prohibition against double jeopardy. *United States* v. *Benz*, 282 U.S. 304 (1931); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874). Courts of Appeals have often rejected belated efforts to cumulate criminal sentences where the original oral pronouncement did not so provide. *Duggins* v. *United States*, 240 F.2d 479 (6th Cir. 1957); *United States* v. *Chiarello*, 214 F.2d 838 (2d Cir. 1954), *cert. denied*, 348 U.S. 702 (1954); *Rutledge* v. *United States*, 146 F.2d 199 (5th Cir. 1944).

APPENDIX

COPY

JK:mj
C. 21944

November 2, 1959

Director
Bureau of Prisons
Department of Justice
Washington 25, D. C.

Re: Harry Joseph Payne v. Paul J. Madigan, Warden, United States Penitentiary, Alcatraz, California Court of Appeals No. 16,552

Dear Sir:

The Court of Appeals, during the argument of the above case, suggested that although the petitioner did not have a present right to habeas corpus there should be some administrative effort to correct his sentence to a intelligible one. Accordingly, it would seem to us that twelve years is the longest defensible sentence under the facts herein.

We are enclosing a copy of our brief in the instant case which states the facts appellant relies on.

Yours very truly,

LYNN J. GILLARD
United States Attorney

By:

JOHN KAPLAN
Assistant United States Attorney

Enclosure

COPY

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
Washington 25

November 17, 1959

Mr. Lynn J. Gillard
United States Attorney
San Francisco, California

Attention: Mr. John Kaplan
Assistant U. S. Attorney

Dear Mr. Gillard:

Re: Harry Joseph Payne v. Paul J. Madigan, Warden, United States Penitentiary, Alcatraz, California, Court of Appeals No. 16,552

This is in reply to your letter of November 2 referring to a suggestion made by the Court of Appeals during argument of subject's appeal from denial of writ of habeas corpus that an effort be made administratively to clarify his sentence. You indicate your belief that 12 years is the maximum which can be defended.

Payne's sentence has been and is now computed as a total of 12 years, representing 1 year in case No. 10676, 2 years in case No. 10677, 2 years in case No. 10678, 2 years in case No. 10679, 2 years in case No. 10680, 1 year in case No. 10681, and 2 years in case No. 10682, all consecutive.

Sincerely yours,

FRANK LOVELAND
Assistant Director

COPY

JK:md

December 2, 1959

Mr. Paul O'Brien, Clerk
United States Court of Appeals
Post Office Building
7th and Mission Streets
San Francisco, California

Re: Harry Joseph Payne v. Paul J. Madigan, Warden, United States Penitentiary, Alcatraz, California, Court of Appeals No. 16,552

Dear Sir:

In view of the fact that the question was raised as to the proper sentence to be recorded for the above appellant, we are enclosing a letter we have received from the United States Bureau of Prisons. As this letter makes clear, the appellant is confined under a 12 year sentence.

Very truly yours,

LYNN J. GILLARD
United States Attorney

JOHN KAPLAN
Assistant U. S. Attorney

Enclosure